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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MICHAEL ADEEB SOLIMAN,

Plaintiff and Appellant,

v.

CVS/PHARMACY, INC.,

Defendant and Respondent.

G046465

(Super. Ct. No. 30-2010-00350595)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Di Cesare, Judge. Affirmed.

William A. Kent for Plaintiff and Appellant.

Sidley Austin, Douglas R. Hart and Jennifer B. Zargarof for Defendant and Respondent.

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Plaintiff Michael Adeeb Soliman sued defendant CVS/Pharmacy, Inc., also known as CVS RX Services, Inc., his former employer. The second amended complaint contained two causes of action, one for wrongful termination and another for malicious prosecution of a criminal proceeding. Defendant moved for summary judgment, arguing the first count was barred by the statute of limitations and plaintiff could not establish prima facie case as to the latter count. The trial court granted the motion and entered a judgment for defendant. On the malicious prosecution claim it ruled plaintiff failed to establish a triable issue of fact on the favorable termination element.

On appeal plaintiff challenges the dismissal of his malicious prosecution cause of action. He argues a triable issue of fact exists as to why the prosecutor dismissed the underlying criminal action against him pursuant to Penal Code section 1385. Plaintiff also attacks the trial court's denial of his post-summary judgment ruling efforts to depose the prosecutor. Finding no error, we affirm the judgment.

FACTS

Plaintiff, a licensed pharmacist, was employed by defendant at an Upland, California pharmacy working the overnight shift. His job included completing listed assignments on a computer. Plaintiff claimed the assignments required him to "mak[e] what are called 'edits'"

On September 24, 2007, a prescription identified as number 165175, authorizing the distribution of 240 pills of Oxycodone APAP, the generic form of a Schedule II drug named Percocet, was filled for a Ms. Rock. She received the prescription two days later, paying for it with her medical insurance.

A patient prescribed a Schedule II drug must obtain a new prescription from his or her medical provider rather than merely request a refill of the original authorization. Defendant is required to keep an accurate account of its inventory and

distribution of controlled substances and, if it discovers a discrepancy in its supply of a controlled substance, report the matter to the federal Drug Enforcement Agency.

On October 8, 2007, during his work shift, plaintiff made three edits to prescription number 165175. First, he changed the patient's last name from Rock to Bock and a few minutes later changed the prescribed medication to Percocet. Later that day, plaintiff reduced the number of days for the supply from 30 days to 19 days. He then filled the prescription, putting 240 Percocet pills into a bottle and placing the bottle in a bin for pick up. It was later determined that the pharmacist initials appearing in the company's computer system at the time of these edits were for a person who was not at work at that time.

Later that day, a pharmacy technician showed Manisha Patel, plaintiff's supervisor, a drug usage report of all customers receiving Oxycodone and Percocet prescriptions, plus labels for prescriptions filled in September or earlier months. The drug usage report was not typically used by pharmacy employees and there was no reason to print out labels for previously filled prescriptions. Patel learned from a second pharmacy technician that plaintiff had recently inquired about how to print out the drug usage report. According to Patel, she asked plaintiff about the edits to prescription number 165175 two days later. He denied knowing anything about it. Thereafter, plaintiff made a fourth edit to the prescription.

Investigating the matter further, Patel determined prescription number 165175 appeared in the logs for both Oxycodone and Percocet and 240 pills of each drug had been deducted from the pharmacy's inventory. She also learned Ms. Rock was a pharmacy customer who regularly filled her Oxycodone prescriptions at the store and, when contacted, acknowledged receiving the September prescription. Patel contacted the prescribing physician who denied having a patient named Bock and also denied prescription number 165175 was for Percocet. There was no record of a purchase for the 240 Percocet pills missing from the pharmacy's inventory.

Patel contacted her supervisor and a company loss prevention manager. They reviewed recordings from store surveillance cameras that depicted plaintiff's actions on October 8. All three submitted declarations stating the store's surveillance cameras showed plaintiff retrieving the Percocet pills from the safe, placing them into a paper bag, later retrieving a CVS shopping bag from an unoccupied cash register station, depositing the paper bag into the shopping bag, and leaving the pharmacy carrying the shopping bag.

In his opposing declaration, plaintiff acknowledged making the edits on October 8 and placing the Percocet pills into the paper bag. But he claimed to have placed the bag in a bin for pickup, denied stealing the Percocet pills, and asserted the store's surveillance video did not show him leaving the store with them.

In November, upon plaintiff's return from a month-long vacation, defendant's employees questioned him about the October edits to prescription number 165175. Plaintiff testified at his deposition he told the supervisors he could not recall the incident. In his declaration opposing the summary judgment motion, plaintiff stated that when confronted by defendant's employees about the edits, he "was very upset and could not function or think," and when "filling out [defendant's] questionnaire," "wrote gibberish to the questions and left it at that."

Defendant's employees contacted the local police department. The officers who came to the store questioned plaintiff and also reviewed the surveillance tapes. They then arrested plaintiff.

In February 2008, the San Bernardino District Attorney charged plaintiff with embezzlement and theft. After several pretrial hearings the prosecution dismissed the charges in July 2009. According to the court's minutes of July 6, a "[p]lea bargain agreement [was] filed and thereafter, "[o]n motion of the deputy District Attorney," the case was "dismissed pursuant to 1385 PC." The attached plea bargain agreement also refers to a dismissal of the case under Penal Code section 1385, but contains no

explanation for this resolution. In his deposition, plaintiff admitted he did not know why the district attorney dropped the charges.

In its minute order granting summary judgment, the trial court concluded plaintiff failed to establish a triable issue of fact on whether the criminal prosecution's dismissal constituted a favorable termination. "[C]ases support the proposition that a dismissal in the interests of justice does not necessarily imply factual innocence nor a favorable termination" In addition, the court noted the "extensive documentation from plaintiff's related criminal file" did not support his contention "the criminal case was dismissed due to lack of evidence."

DISCUSSION

1. Standard of Review

Code of Civil Procedure section 437c provides "[a]ny party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc., § 437c, subd. (a).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) Thus, "[t]he motion . . . shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)

"The burden of persuasion remains with the party moving for summary judgment. [Citation.]" (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) While "th[at] party . . . [also] bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he

carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.” (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850; see also *Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 555.) “When the defendant moves for summary judgment, in those circumstances in which the plaintiff would have the burden of proof by a preponderance of the evidence, the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff ‘does not possess and cannot reasonably obtain, needed evidence.’ [Citation.]” (*Kahn v. East Side Union High School Dist.*, *supra*, 31 Cal.4th at p. 1003.)

““““We review the trial court’s decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.”” [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.’ [Citation.]” (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1249-1250; see also *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 843 [“court must ‘consider all of the evidence’ and ‘all’ of the ‘inferences’ reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party”].)

2. *Favorable Termination*

“Under the governing authorities, in order to establish a cause of action for malicious prosecution of either a criminal or civil proceeding, a plaintiff must demonstrate ‘that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff’s, favor [citations]; (2)

was brought without probable cause [citations]; and (3) was initiated with malice [citations].’ [Citation.]” (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 871-872.) As noted, the trial court granted summary judgment on the malicious prosecution count, finding no triable issue of fact existed as to the favorable termination element.

“‘The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort [of malicious prosecution].’ [Citation.]” (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 341.) As a result, the “plaintiff must establish more than that he prevailed in the underlying action. [Citation.] . . . [¶] The ‘carefully circumscribed’ elements of the tort of malicious prosecution allow litigants with potentially valid claims to institute legal proceedings without fear of subsequent malicious prosecution lawsuits. [Citation.] ‘[C]ourts have long recognized that the tort has the potential to impose an undue “chilling effect” on the ordinary citizen’s willingness to report criminal conduct or to bring a civil dispute to court, and, as a consequence, the tort has traditionally been regarded as a disfavored cause of action.’ [Citation.]” (*Pattiz v. Minye* (1998) 61 Cal.App.4th 822, 827.) Consequently, “[i]t is hornbook law that the plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he complains terminated in his favor.’ [Citation.]” (*Casa Herrera, Inc. v. Beydoun, supra*, 32 Cal.4th at p. 341.)

In *Jaffe v. Stone* (1941) 18 Cal.2d 146, the Supreme Court held a magistrate’s dismissal of a felony criminal prosecution at the preliminary hearing due to a lack of evidence of guilt, even though it did not constitute a bar to further prosecution, constituted a sufficient termination to support the plaintiff’s subsequent civil action for malicious prosecution. But in so ruling, the court explained “[i]t is not enough . . . merely to show that the proceeding was dismissed. . . . If the accused were actually convicted, the presumption of his guilt or of probable cause for the charge would

be so strong as to render wholly improper any action against the instigator of the charge. . . . Hence, if the criminal proceeding goes to trial, it is ordinarily necessary, as a foundation for a malicious prosecution suit, that the plaintiff should have been acquitted. [Citations.] The same fundamental theory is applied in testing a dismissal or other termination without a complete trial on the merits. If it is of such a nature as to indicate the innocence of the accused, it is a favorable termination sufficient to satisfy the requirement. If, however, the dismissal is on technical grounds, for procedural reasons, or for any other reason not inconsistent with his guilt, it does not constitute a favorable termination.” (*Id.* at p. 150.)

The earlier criminal prosecution against plaintiff, instituted at the behest of defendant’s employees, was eventually dismissed by the court under Penal Code section 1385. It declares, “[t]he judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. . . .” (Pen. Code, § 1385, subd. (a).) Cases have recognized that the dismissal of a criminal prosecution in the interests of justice under Penal Code section 1385, without more, does not support an inference of a favorable termination.

People v. Hatch (2000) 22 Cal.4th 260, held the dismissal of a prosecution in the interests of justice after the jury declared it was deadlocked did not bar retrial of the defendant. “Although a trial court may apply the substantial evidence standard when dismissing pursuant to [Penal Code] section 1385, it usually does not. Indeed, the standard for dismissal under section 1385 is quite broad and permits dismissal under a variety of circumstances. For example, a court may dismiss under section 1385 if it believes ‘the only purpose to be served by a trial or a retrial is harassment of the defendant . . . notwithstanding the fact that there is sufficient evidence of guilt, however weak, to sustain a conviction on appeal.’ [Citation.] Thus, a section 1385 dismissal may not even ‘involve a consideration of the merits of the cause.’ [Citation.] [¶] Because section 1385 dismissals often are not based on the insufficiency of the evidence as a

matter of law, we believe these dismissals should not be construed as an acquittal for legal insufficiency unless the record clearly indicates that the trial court applied the substantial evidence standard. . . . Absent such a showing, we will assume the court did *not* intend to dismiss for legal insufficiency and foreclose reprosecution.” (*Id.* at p. 273, fn. omitted.)

Hatch involved a felony criminal prosecution. This case, by contrast, concerned misdemeanor charges only. Hence, the dismissal of plaintiff’s prior criminal prosecution did constitute a bar to reprosecution. (Pen. Code, § 1387, subd. (a); *People v. Hernandez* (2010) 181 Cal.App.4th 404, 410-411.) Nonetheless, *Hatch*’s observation dismissals under Penal Code section 1385 are not necessarily based on insufficiency of the evidence and its declaration that, absent a reference to lack of evidence as the basis for the dismissal, a court may not presume the court relied on it also applies here.

Cases seeking damages for malicious prosecution where an underlying criminal prosecution was dismissed in the furtherance of justice follow the same approach. In *Oppenheimer v. Tamblyn* (1958) 162 Cal.App.2d 293, the appellate court held a complaint for malicious prosecution based on a previously dismissed criminal charge “was . . . subject to demurrer” where “[t]here [wa]s no statement in [the] complaint of the ground for dismissal of the proceedings” (*Id.* at p. 296.)

In *De La Riva v. Owl Drug Co.* (1967) 253 Cal.App.2d 593, the plaintiff was charged with conspiracy to steal the defendants’ merchandise. After being bound over for trial at the preliminary hearing, the plaintiff moved to quash the information under Penal Code section 995. That motion was denied and he did not seek further review of the ruling. Later, at the prosecutor’s request, the case was dismissed in the interests of justice. The plaintiff then sued the defendants for malicious prosecution. They asserted res judicata as an affirmative defense, citing the plaintiff’s failure to seek review of the denial of his 995 motion and arguing “inherent in the order of plaintiff’s commitment for trial is a finding that there was probable cause to believe him guilty of

the offenses charged” (*Id.* at p. 595.) The trial court conducted a trial on this special defense and entered judgment for the defendants.

The Court of Appeal reversed. Noting, “the holding of a person to answer by the committing magistrate is not conclusive evidence that the prosecution later complained of was with probable cause” (*De La Riva v. Owl Drug Co., supra*, 253 Cal.App.2d at p. 595), and recognizing the “the limited scope of review governing motions under [Penal Code] section [995]” (*ibid.*), the appellate court held defendants’ *res judicata* defense failed.

Then *De La Riva* considered “whether there was a favorable termination of [the underlying] proceeding.” (*De La Riva v. Owl Drug Co., supra*, 253 Cal.App.2d at p. 599.) Discussing the nature of a dismissal in the interests of justice, the court distinguished *Jackson v. Beckham* (1963) 217 Cal.App.2d 264, where the dismissal of the prior criminal prosecution was expressly made “‘by reason of lack of evidence and in the interest of justice.’” (*Id.* at p. 269.) *De La Riva* court noted that, in the case before it, “the only ground for the order of dismissal was ‘in the interests of justice.’ . . . In the light of the meager showing on the instant point by all parties to the present appeal, we would experience some difficulty in determining whether the dismissal in question tends to indicate the innocence of the accused and, in such circumstances, would warrant a finding of a termination favorable to plaintiff. The term ‘In the interests of justice’ implies considerations which would favor each side to this litigation.” (*De La Riva v. Owl Drug Co., supra*, 253 Cal.App.2d at pp. 599-600.) Nonetheless, *De La Riva* reversed the judgment for further proceedings because “there is no discussion of such element in any of the briefs; no testimony was taken with respect thereto, and there is no finding covering this particular element.” (*Id.* at p. 600.)

Another relevant case is *Womack v. County of Amador* (E.D.Cal. 2008) 551 F.Supp.2d 1017. There the plaintiff was prosecuted by the California Attorney General for violating environmental laws after he removed and disposed of an underground

storage tank. The state court, at the Attorney General's request, dismissed the criminal prosecution in the interests of justice. The Attorney General then instituted a civil enforcement action against the plaintiff. When the plaintiff later filed suit in federal court, the defendant moved for summary adjudication on his malicious prosecution cause of action. The district court granted the motion, rejecting the plaintiff's "bald[] assert[ion] . . . that a termination 'in the interests of justice' is sufficient to satisfy the favorable termination element of his malicious prosecution claim at the summary judgment stage. . . . As the party bearing the burden of proof on this issue at trial, Womack was required, after the County pointed to the absence of evidence on this issue, to produce evidence indicating that the criminal prosecution terminated in such a manner to reflect the action lacked merit or would result in a decision favorable to Womack. [He] failed to do so. Accordingly, because the termination of the underlying prosecution leaves some doubt concerning Womack's innocence or liability, and because Womack failed to establish a genuine issue of material fact as to whether the underlying dismissal constitutes a favorable termination, the County is entitled to summary adjudication on [the] malicious prosecution claim." (*Id.* at pp. 1032-1033, fns. omitted.)

Plaintiff's underlying criminal prosecution was resolved with the cryptic entry, "[o]n the motion of the deputy District Attorney, case is dismissed pursuant to 1385 PC." As noted, he had the burden of alleging and proving the dismissal of the criminal prosecution indicated his innocence of the criminal charges. (*Casa Herrera, Inc. v. Beydoun, supra*, 32 Cal.4th at p. 341.) Furthermore, under *Hatch* a court cannot presume the criminal prosecution's dismissal was based on insufficiency of the evidence absent something in the record indicating that was the basis for it. (*People v. Hatch, supra*, 22 Cal.4th at p. 273.)

At his deposition, plaintiff acknowledged he did not know why the prosecutor dismissed the criminal action. Other than presenting court records showing numerous continuances of the matter over a 17 month period, with several of them based

on efforts to obtain and/or review discovery materials, plaintiff presents nothing to suggest the dismissal reflected he was innocent. To the contrary, the parties' signed time waiver for the last continuance request before the July 6, 2009 hearing states "[t]he reason for the request" was to "convey the offer." In addition, the prosecutor moved to dismiss the case after the parties filed a signed plea bargain agreement with the court. While the latter document's "[d]ismissed PC 1385" entry is equally uninformative, the reference to an offer and the execution of a written plea bargain before requesting dismissal suggests something other than insufficiency of the evidence motivated the prosecutor to take this action.

Plaintiff quotes from and relies extensively on statements from his attorney's declaration opposing defendant's summary judgment motion. That material cannot properly be considered. The trial court sustained defendant's objections to counsel's declaration and plaintiff makes no effort here to establish the trial court's evidentiary rulings constituted an abuse of discretion. "On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334.) Thus, plaintiff's extensive citation to and reliance on his attorney's declaration must be disregarded.

Next, plaintiff cites to out-of-state cases indicating delays in bringing a criminal case to trial support a finding the dismissal of his criminal case constituted a favorable termination. But those cases do not support his argument. In *Brown v. Town of Henrietta* (N.Y.Sup.Ct. 1983) 118 Misc.2d 133 [459 N.Y.S.2d 996], the court ruled "a dismissal in the 'furtherance of justice' cannot be branded as a determination in favor of the defendant without investigating the facts which lead to the disposition. Each case must be evaluated separately to determine whether a dismissal in the 'furtherance of justice' was or was not on the merits." (*Id.* at p. 998; see also *Cantalino v. Danner*

(2001) 96 N.Y.2d 391, 396 [754 N.E.2d 164] [“[a] case-specific rule is particularly appropriate for dismissals in the interest of justice,” and “the question is whether, under the circumstances of each case, the disposition was inconsistent with the innocence of the accused”].) *Brown* concluded the ““compelling factor”” that supported a favorable termination finding was the prosecution’s violation of the plaintiff’s speedy trial right. (*Brown v. Town of Henrietta, supra*, 459 N.Y.S.2d at p. 998.) The same is true of the remaining nonCalifornia cases cited by plaintiff. (*Rich v. Baldwin* (Ill.App. 1985) 133 Ill.App.3d 712, 717-718 [479 N.E.2d 361]; *Loeb v. Teitelbaum* (N.Y.App.Div. 1980) 77 A.D.2d 92, 101 [432 N.Y.S.2d 487].) Here, during the pendency of his criminal prosecution plaintiff repeatedly waived his speedy trial right and thus cannot rely on a speedy trial denial to establish the favorable termination element.

Another claim plaintiff makes is that a dismissal pursuant to Penal Code section 1385 is equivalent to a prosecutor’s entry of a nolle prosequi and he asserts *Jaffe v. Stone, supra*, 18 Cal.2d 146 stands for the proposition a termination of this nature suffices to support a malicious prosecution cause of action. First, California law does not recognize a prosecutor’s right to enter a nolle prosequi. (Pen. Code, § 1386 [“[t]he entry of a nolle prosequi is abolished, and neither the Attorney General nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in Section 1385”].) Second, citing numerous decisions from other states *Jaffe* merely noted “there is a favorable termination sufficient to form the basis of a tort action . . . where the prosecuting attorney at the trial enters a *nolle prosequi for lack of evidence*. [Citations.]” (*Jaffe v. Stone, supra*, 18 Cal.2d at p. 151, some italics added.)

Plaintiff relies on several cases quoting a statement originating in *Minasian v. Sapse* (1978) 80 Cal.App.3d 823 that “[a] dismissal for failure to prosecute . . . does reflect on the merits of the action, and that reflection . . . arises from the natural assumption that one does not simply abandon a meritorious action once instituted.” (*Minasian v. Sapse, supra*, 80 Cal.App.3d at p. 827; see also *Lackner v. LaCroix* (1979)

25 Cal.3d 747, 750-751; *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1400-1401.) *Minasian* involved the dismissal of a prior civil action under former Code of Civil Procedure section 583, subdivision (a) for failing to bring it to trial within two years. As defendant notes, all of the cases relied on involved malicious prosecution actions where the underlying litigation was a civil action. Plaintiff cites no case applying this principle where the underlying action was a criminal prosecution dismissed in the furtherance of justice.

Defendant also notes even *Minasian* acknowledged “[w]hether or not the termination of an action prior to a determination on the merits tends to indicate innocence on the part of the defendant of the acts with which he is charged must depend on whether the manner of termination *reflects* on the merits of the matter” (*Minasian v. Sapse, supra*, 80 Cal.App.3d at p. 827), and in a footnote cited examples where this element would not be established: “A dismissal resulting from negotiation, settlement, or consent is generally not deemed a favorable termination of the proceedings. [Citation.] In such a case the dismissal reflects ambiguously on the merits of the action as it results from the joint action of the parties, thus leaving open the question of defendant’s guilt or innocence. [Citation.] *Similarly ambiguous is the dismissal of criminal proceedings ‘in the interests of justice,’ as this term ‘. . . implies considerations which would favor each side to this litigation.’* [Citation.]” (*Id.* at p. 827, fn. 4, italics added.)

The other California cases plaintiff relies on are inapposite to the issue presented in this appeal. *Rich v. Siegel* (1970) 7 Cal.App.3d 465 involved whether an action for malicious prosecution could be maintained where the present plaintiff obtained a partial summary judgment against the present defendant in a still pending civil action. The Court of Appeal affirmed a dismissal of the case, holding a malicious prosecution plaintiff must show “‘the former proceeding had been *legally terminated*’” (*id.* at p. 468), and “[i]n the instant case, there has been no such termination of the prior proceeding” (*id.* at p. 469). *Kennedy v. Byrum* (1962) 201 Cal.App.2d 474 involved a prior civil action

dismissed without prejudice by the defendant in a malicious prosecution after the plaintiffs had answered it and the case was set for trial. The Court of Appeal affirmed a judgment for the plaintiffs stating “[t]he record shows that there had been a termination of the earlier action in [their] favor” (*Id.* at p. 479.) Here, there is no question the prior criminal prosecution had been legally terminated. The sole issue is whether that termination indicated plaintiff’s innocence of the underlying charges.

Bulkley v. Klein (1962) 206 Cal.App.2d 742 is also distinguishable on its facts. There the plaintiff had been charged with theft, but on the day set for trial the defendant who had obtained a warrant for the plaintiff’s arrest failed to appear. The court dismissed the prosecution with a docket entry, “Case dismissed . . . for lack of evidence.” (*Id.* at p. 745.) Later, the court changed the docket to read, “Complainant failed to appear — case continued to some future date.” (*Ibid.*) The appellate court upheld a judgment for the plaintiff in the malicious prosecution action finding, “[a]fter the entry was made in the . . . court docket showing that the case was dismissed for lack of evidence the court no longer had jurisdiction of the case, and the [judicial officer] was without power to review his judgment; the change thereafter was a nullity. A final termination of the criminal case favorable to the plaintiff was thus proved. [Citation.]” (*Id.* at p. 750.)

Plaintiff had the burden of showing the termination of the prior criminal prosecution indicated he was innocent of the charges. While the prosecution was legally terminated, the criminal court’s dismissal under Penal Code section 1385 in the interests of justice, standing alone, did not establish the termination resulted from insufficiency of the evidence to support a conviction. Nor does the other evidence and legal authority cited by plaintiff justify a different result. Consequently, we conclude the trial court properly granted summary judgment in defendant’s favor on the malicious prosecution cause of action.

3. Refusal to Allow Deposition of Prosecutor

This case was set for trial on September 19, 2011. Defendant filed its summary judgment motion in June 2011, setting the hearing for August 18. Thereafter, with the parties stipulating to it, the court entered an order rescheduling to September 15. On that date, the court heard the motion and granted it.

The next day plaintiff filed a motion for reconsideration and three days later issued a subpoena to Garo Mandenlian, the deputy district attorney who requested the dismissal of the prior criminal prosecution. The San Bernardino District Attorney's office sent plaintiff's counsel a letter objecting to the subpoena.

On September 26, plaintiff filed an ex parte application for a bench warrant. The court heard the application September 27 and denied it, stating on the record the request "is . . . not the subject of an ex parte hearing," and involved "discovery after" the granting of "a motion for summary judgment."

The next day, plaintiff filed an ex parte application for a motion shortening time for a motion to compel Mandenlian to appear for a deposition. At a hearing on September 30, after listening to argument from both sides, the court denied plaintiff's request stating, "[t]his is a post motion for summary judgment deposition of a third party that happens to be a [deputy] district attorney that was in charge of a criminal prosecution involving . . . the plaintiff. And it does not qualify for ex parte relief. So if you are going to file a motion, it will have to be in the normal course of affairs." Nearly seven weeks later the trial court heard and denied plaintiff's reconsideration motion.

Plaintiff now argues these rulings "constituted reversible error as the denial to take evidence violated the discovery rules as well as denying the litigant due process." Defendant responds the trial court did not err noting plaintiff sought to depose the prosecutor "eleven days after the [s]uperior [c]ourt entered summary judgment . . . , and over a month after the discovery cutoff"

We agree with defendant. ““Management of discovery generally lies within the sound discretion of the trial court.” [Citation.] “Where there is a basis for the trial court’s ruling and it is supported by the evidence, a reviewing court will not substitute its opinion for that of the trial court. [Citation.] The trial court’s determination will be set aside only when it has been demonstrated that there was ‘no legal justification’ for the order granting or denying the discovery in question.” [Citation.]” (*Lickter v. Lickter* (2010) 189 Cal.App.4th 712, 740.)

Plaintiff claims a party is entitled to conduct discovery in a “pending action” (Code Civ. Proc., § 2017.010) and an action remains pending until entry of final judgment. (*Department of Fair Employment & Housing v. Superior Court* (1990) 225 Cal.App.3d 728, 732.) But as defendant notes a party’s entitlement to conduct discovery terminates 30 days before “the date initially set for the trial of the action.” (Code Civ. Proc., § 2024.020, subd. (a).) Plaintiff’s post-summary judgment effort to depose the prosecutor came too late.

Nor is this a case where plaintiff, as the nonmoving party, sought a continuance of the summary judgment motion to obtain evidence establishing the reason for the prosecutor’s request to dismiss the criminal prosecution. (Code Civ. Proc., § 437c, subd. (h); *Park v. First American Title Co.* (2011) 201 Cal.App.4th 1418, 1427-1428.) The first attempt to seek the prosecutor’s deposition came over a week after the court entered its ruling granting summary judgment. Plaintiff does not cite to anything in the voluminous record indicating he raised the need to depose the prosecutor before or at the hearing on that motion.

In addition, contrary to plaintiff’s argument, the trial judge did give reasons for his denying plaintiff’s ex parte requests. In part, the court ruled plaintiff’s requests were procedurally improper. California Rules of Court, rule 3.1202(c) requires a party seeking ex parte relief to “make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm,

immediate danger, or any other statutory basis for granting” it. Again, plaintiff fails to present any argument or authority that the trial court erred in ruling his post-summary judgment discovery requests were procedurally improper.

The mere fact plaintiff had filed a motion for reconsideration did not justify ex parte relief. Code of Civil Procedure section 1008 requires a “party affected by [an] order” to “state by affidavit what . . . new or different facts, circumstances, or law” exist to support granting reconsideration of the prior ruling. (Code Civ. Proc., § 1008, subd. (a).) It is not a mechanism authorizing additional discovery in the hope the moving party will find new evidence to justify granting the motion.

Thus, we conclude plaintiff has failed to show the trial court abused its discretion in denying his post-summary judgment discovery requests.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.